Petition

80-1155
No.

Office-Supreme Court, U.S.
FILED
NOV 27 1981
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

LLOYD J. BADGETT

V.

MARY FRANCES ERSPAN

PETITION FOR CERTIORARI

STEPHEN F. HEFNER & ASSOCIATES
109 West Houston Street
Sherman, Texas 75090

QUESTIONS PRESENTED

1. Whether a Texas court judgment rendered in February 21, 1963, is invalid to the extent that it purports to divide United States Army military retirement benefits because the court had no jurisdiction to enter same because of the Federal Supremacy Clause, as interpreted by this Court in McCarty v. McCarty, U.S. ____, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981)?

2. Whether the said Texas court judgment described above, if not void for want of jurisdiction prior to the decision in McCarty, supra, is now considered void after the decision in McCarty such that it is no longer enforceable against the Petitioner herein?

3. Whether the doctrine of res judicata should be applied to said Texas court judgment which would have the effect of treating the Petitioner differently from others similarly situated in legal and factual position?

4. Whether, since the proceeding in the trial court of this cause was instituted to enforce the Texas state court judgment as to military retirement benefits, since that portion of the state court judgment is void, the trial court in

this cause had no jurisdiction to render judgment, nor to allow enforcement of such void judgment - an act in and of itself, a nullity?

5. Whether in the alternative to the question stated in number 4 above, in light of McCarty, the trial court judgment, for the reasons set out in number 4 above, should now be reversed and rendered?

TABLE OF CONTENTS

Table of Authorities iii

Opinions 2

Jurisdiction 2

Questions Presented 3

Constitutional, Statutory and Rules Provisions Involved 4

Concice Statement of theCase 5

Reasons for Granting the Petition . . . 6

Conclusion 7

Certificate of Service 7

Appendices

Appendix A - Constitutional and Statutory Provisions Involved

Appendix B - Decisions

Appendix C - Court of Appeals Decision

Appendix D - Motion for Rehearing En Banc

Appendix E - Court of Appeals Decision on Motion for Rehearing En Banc

Appendix F - Motion to Stay Mandate

Appendix G - Court of Appeals Decision on Motion to Stay Mandate

Appendix H - Findings of Fact and Conclusions of Law of United States District Court for the Western District of Texas, El Paso Division

Appendix I - Notice of Appeal

Appendix J - Contempt pending in United States District Court for the Western District of Texas, El Paso Division

Appendix K - Divorce Judgment

Appendix L - Decision of Court of Civil Appeals of Texas, Eastland, in Dale E. Koon, Appellant, v. Anna Mae Koon, Appellee

Decision of Court of Appeal, Fourth Appellate District, Division One, State of California, in In re the Marriage of Carol and John Jacanin

TABLE OF AUTHORITIES

Cases

Durfee v. Duke, 375 U.S. 106, 84 S.Ct. 242 (1963) 6

Kalb v. Feuerstein, 308 U.S. 433, 60 S.Ct. 343 (1940) 6

McCarty v. McCarty, ____ U.S. ____, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981) 3

Constitutional and Statutory Provisions

Supremacy Clause, U.S. Const., Art. VI, cl. 2 4

10 U.S.C. §1434 4

10 U.S.C. §1447 4

10 U.S.C. §1450 5

10 U.S.C. §2771 4

10 U.S.C. §3929 4

28 U.S.C. §1254(1) 3

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

LLOYD J. BADGETT

V.

MARY FRANCES ERSPAN

PETITION FOR CERTIORARI

STEPHEN F. HEFNER & ASSOCIATES
109 West Houston Street
Sherman, Texas 75090

PETITION FOR CERTIORARI

The Petitioner, Lloyd J. Badgett, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on June 10, 1981, and on October 9, 1981.

OPINIONS

The opinions of the Court of Appeals are reported respectively at 647 F.2d 550 and 659 F.2d 26, Appendix C and E.

There was no formal reported opinion of the District Court. Excerpts of the transcript in that Court, including the opinion of the Court, are reproduced in Appendix H and I to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on June 10, 1981. Subsequently, the Petitioner on the 24th day of June, 1981, filed his Motion for Rehearing En Banc, a copy of which is reproduced in Appendix D to this Petition. On the 9th day of October, 1981, the Court of Appeals denied the Motion for Rehearing, Appendix E. On the 21st day of October, 1981, the Petitioner filed his Motion to Stay Mandate pending the filing of this Petition, a copy of which is reproduced in Appendix F to this Petition, and on the 29th day of October, 1981, a stay was granted extending the time for filing this Petition for writ of certiorari to and including

November 28, 1981. A copy of said order is reproduced in Appendix G to this Petition. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a Texas court judgment rendered in February 21, 1963, is invalid to the extent that it purports to divide United States Army military retirement benefits because the court had no jurisdiction to enter same because of the Federal Supremacy Clause, as interpreted by this Court in McCarty v. McCarty, U.S. ____, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981)?

2. Whether the said Texas court judgment described above, if not void for want of jurisdiction prior to the decision in McCarty, supra, is now considered void after the decision in McCarty such that it is no longer enforceable against the Petitioner herein?

3. Whether the doctrine of res judicata should be applied to said Texas court judgment which would have the effect of treating the Petitioner differently from others similarly situated in legal and factual position?

4. Whether, since the proceeding in the trial court of this cause was instituted to enforce the Texas state court judgment as to military retirement benefits, since that portion of the state court judgment is void, the trial court in

this cause had no jurisdiction to render judgment, nor to allow enforcement of such void judgment - an act in and of itself, a nullity?

5. Whether in the alternative to the question stated in number 4 above, in light of McCarty, the trial court judgment, for the reasons set out in number 4 above, should now be reversed and rendered?

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

Supremacy Clause, U.S. Const., Art. VI, cl. 2, which reads in pertinent part as follows:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound therby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Statutory provisions:

10 U.S.C. §3929

10 U.S.C. §2771

10 U.S.C. §1434

10 U.S.C. §1447

10 U.S.C. §1450

CONCISE STATEMENT OF THE CASE

This is an action brought by former wife in the Federal District Court for the Western District of Texas, El Paso Division, against the Petitioner, Lloyd J. Badgett, in order to collect U.S. Army military retirement benefits awarded by an El Paso state district court in 1963 in a divorce judgment between the parties. The Federal District Court decided the case adversely to the Petitioner, and the Petitioner appealed this decision to the Court of Appeals for the Fifth Circuit, which also decided the case adversely to the Petitioner. Then, this Court rendered the decision in McCarty, and in response to that decision, the Petitioner filed a Motion for Rehearing En Banc, which the Court of Appeals, with one judge dissenting, affirmed (647 F.2d 550). There are also pending in the Federal District Court in El Paso a Motion for Contempt against Petitioner, and a Bankruptcy cause pending in the Federal District Court for the Eastern District of Arkansas, a Motion to Stay collection by garnishment of the military retirement benefits, both of which must be stayed pending decision on this Petition because each involves similar issues concerning the validity, past and present, of the Texas divorce judgment. Reproduced copies of the said

Motions and Bankruptcy pleadings are included in Appendix F to this Petition.

REASONS FOR GRANTING THE WRIT

1. This court in McCarty decided that the Federal Supremacy Clause prevented a state court in a divorce proceeding from dividing military retirement benefits as community property - in effect, that a state court has no jurisdiction. Since this is a question of constitutional supremacy, it has existed since the inception of the concept of military retirement which pre-dates the entry of the state court judgment in this cause on February 21, 1963, and at that time the Texas court did not have jurisdiction to divide the military retirement benefits of the Petitioner. This position is supported by other cases of this Court in other areas of federal preemption. See, Kalb v. Feuerstein, 308 U.S. 433, 60 S.Ct. 343 (1940). See also dicta in Durfee v. Duke, 375 U.S. 106, 84 S.Ct. 242 (1963). Jurisdiction of a court may be challenged at any time in the proceeding, and in this case were raised in a Rule 12(b)(6) Motion filed by the Petitioner in the trial court.

2. Decisions of courts both the State of Texas and the State of California support the position of Petitioner. See, Koon v. Koon, 621 S.W.2d 834 (Tex.Civ. App.- Eastland, 1981) and Jacanin v. Jacanin, Cal.Ct.App. (unpublished) 81

Daily J. D.A.R. 2917 (1981) reproduced in Appendix L to this Petition.

3. The doctrine of res judicata should not be applied in this cause to the Texas divorce judgment would result in the Petitioner, and others similarly situated, being treated, under the decision in McCarty, unequally to those individuals defending this issue for the first time subsequent to the decision in McCarty. See, dissenting opinion on Motion for Rehearing En Banc, Erspan v. Badgett, Appendix E.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted, and the various Courts in which ancillary matters are now pending should be notified in accordance with law of the pendency of this Petition.

Respectfully submitted,

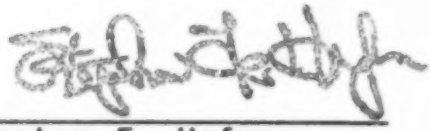
STEPHEN F. HEFNER & ASSOCIATES
109 West Houston
Sherman, Texas 75090
(214) 892-1515

BY:
Stephen F. Hefner

CERTIFICATE OF SERVICE

A copy of the foregoing Petition for Certiorari has been mailed, postage pre-

paid, to Colbert N. Coldwell, Guevara, Rebe & Baumann, Attorney for Respondent, 601 North Mesa, P. O. Box 2009, El Paso, Texas 79950, this the 27th day of November, 1981.



Stephen F. Hefner

APPENDIX A

APPENDIX A
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States of America, Amendment XV, §1: ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law."

Supremacy Clause, U.S. Const., Art. VI, cl. 2, which reads in pertinent part as follows:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Statutory provisions:

10 U.S.C. §3929

10 U.S.C. §2771

10 U.S.C. §1434

10 U.S.C. §1447

10 U.S.C. §1450

APPENDIX B

APPENDIX B
THE DECISIONS BELOW

The Sixty-Fifth Judicial District Court of El Paso County, Texas, entered judgment of divorce between the parties on February 21, 1963, in Cause No. 102449, styled "Mary Frances Badgett, Plaintiff v. Lloyd J. Badgett, Defendant."

The 158th Judicial District Court of Denton County, Texas, entered a judgment to Plaintiff against Defendant for unpaid military retirement benefits on June 15, 1971, in Cause No. 70-1032-B.

The United States Court of Appeals, Fifth Circuit, Unit A, affirmed the District Court of Denton County judgment on January 21, 1972. Badgett v. Erspan, 476 S.W.2d 381 (Tex.Civ.App.--Ft. Worth, 1972, no writ).

The United States Court of Appeals, Fifth Circuit, Unit A, ruled in favor of Plaintiff on June 10, 1981. (Appendix C)

The United States Court of Appeals, Fifth Circuit, Unit A, denied the Motion for Rehearing En Banc on October 9, 1981. (Appendix E)

The United States Court of Appeals, Fifth Circuit, Unit A, affirmed the Motion to Stay Mandate on October 29, 1981. (Appendix G)

APPENDIX C

MARY FRANCES ERSPAN,

Plaintiff-Appellee, Cross-Appellant

vs.

LLOYD J. BADGETT,

Defendant-Appellant, Cross-Appellee

No. 79-4011

United States Court of Appeals,
Fifth Circuit,
Unit A

June 10, 1981.

Rehearing En Banc Denied Oct. 9, 1981.

Before AINSWORTH and SAM D. JOHNSON, Circuit Judges, and HUNTER*, District Judge.

SAM D. JOHNSON, Circuit Judge:

This is an action to enforce the terms of a 1963 divorce decree that awarded to plaintiff one-half of defendant's accumulated right under a United States Army retirement benefits program. Following a non-jury trial, the district court awarded plaintiff accrued and unpaid benefits in the amount of $34,641.90 plus interest

from the date of judgment, and ordered defendant to maintain with the United States Army an allotment order providing for the payment directly to plaintiff of her one-half share of all future payments to which she is entitled. The district court also permanently enjoined defendant from proceeding with his civil contempt action against plaintiff in the United States District Court for the Eastern District of Missouri, Southeastern Division, the court from which defendant obtained a discharge in bankruptcy in 1973. The judgment of the district court is affirmed.

I.

Plaintiff and defendant were divorced in 1963. The divorce decree, which was rendered in the state district court in El Paso, Texas, provided in part that defendant's accumulated right to United States Army retirement benefits was community property, and, as such, was the joint property of plaintiff and defendant upon divorce. The decree ordered defendant to execute all documents necessary to accomplish the payment directly to plaintiff of her one-half share of each payment made after defendant's retirement from the Army, and provided that defendant was personally responsible to plaintiff for such payments in the event that they could not be made directly to her by the Army.

Shortly after the divorce, defendant

retired from the Army. He paid to plaintiff one-half of his military retirement benefits from the date of his retirement through March 1967; he has paid nothing to plaintiff since that time. In 1971, plaintiff obtained a judgment against defendant for accrued benefits due her in the amount of $8,606.28. The judgment was entered by the state district court in Denton County, Texas. This judgment was affirmed by the Texas Court of Civil Appeals in Badgett v. Erspan, 476 S.W.2d 381 (Tex.Civ.App.-Fort Worth 1972, no writ), but defendant has not paid it. No execution has ever been requested or issued on the Denton County judgment.

In 1972, defendant filed a petition in bankruptcy in the United States District Court of the Eastern District of Missouri, Southeastern Division. He listed among his debts plaintiff's 1971 Denton County judgment as well as the El Paso divorce decree. Plaintiff received notice of the petition in bankruptcy, but filed no claim in the bankruptcy proceedings, and did not object to the discharge in bankruptcy that defendant obtained thereby.

Jurisdiction in the case sub judice is predicated upon diversity of citizenship, 28 U.S.C.§ 1332. Plaintiff seeks from defendant her share of the retirement benefits paid by the government to defendant, but not forwarded to her, since June 10, 1967, the date of the Denton County

judgment. Plaintiff also seeks an order that will ensure her ability to receive future retirement benefits to which she is entitled. In response, defendant argues that his 1973 discharge in bankruptcy absolved him of any liability to plaintiff for either past or future retirement benefits.

Following submission of the instant case to the federal district court, defendant instituted contempt proceedings against plaintiff in the Missouri bankruptcy court from which he obtained his discharge, alleging that, by bringing the present action, plaintiff has violated an injunction that arose by operation of law from defendant's discharge in bankruptcy. The federal district court in the present case temporarily enjoined defendant from prosecuting the Missouri contempt proceeding, and subsequently held that defendant's discharge in bankruptcy did not affect his liability to plaintiff for either past or future retirement benefits. Consequently the court ordered defendant to pay to plaintiff $34,641.90 plus interest, which represents one-half of the benefits accrued from June 10, 1971, to the date of the federal district court's judgment herein. The court also ordered defendant to execute and keep in full force and effect with the United States Army an allotment order directing the Army to pay directly to plaintiff one-half of

all future retirement benefits. Finally, the district court entered a permanent injunction preventing defendant from proceeding with his contempt action in the Missouri bankruptcy court.

(1-3) On appeal, defendant argues (1) that the federal district court erred in holding that his 1973 discharge in bankruptcy did not extinguish plaintiff's claim to one-half of defendant's military retirement benefits, (2) that even if the obligation to plaintiff was exempt from discharge under former section 17(a)(7) of the Bankruptcy Act, that provision is unconstitutional on equal protection grounds, and (3) that the district court erred in enjoining defendant from proceeding in the bankruptcy court because that court has jurisdiction to determine dischargeability. Although defendant challenges on appeal the district court's determination that his discharge did not extinguish plaintiff's right to her share of the retirement benefits, he elected not to appeal the district court's award of $34,641.90 representing her share of benefits that defendant already has received.

II.

Section 17(a)(7) of the Bankruptcy Act of 1938, former 11 U.S.C. § 35(a)(7), provided in part:

> A discharge in bankrupty shall release a bankrupt from all of his provable debts, whether

> allowable in full or in part, except such as ... are for alimony due or to become due, or for maintenance or support of wife or child ....

In In re Nunnally, 506 F.2d 1024 (5th Cir. 1975), this Court explored the relationship between Texas community property law, military retirement benefits, and section 17(a)(7). In that case, the former wife was awarded in the divorce proceeding, inter alia, a lien upon her ex-husband's Navy retirement benefits to secure payment of $46,779.41 which represented an advance to the community from her separate estate. Shortly thereafter, the ex-husband filed a petition in bankruptcy, and both the bankruptcy referee and the district court determined that the former wife's right to the retirement benefits was a dischargeable debt. On appeal, the issue presented to this Court was whether the former wife's right to the $46,779.41 awarded by the divorce court, and secured by the lien on the retirement benefits, was a dischargeable debt, or whether it was exempt from discharge under section 17(a)(7). This Court, although recognizing that alimony after divorce is not permitted in Texas, Francis v. Francis, 412 S.W.2d 29, 32 (Tex.1967), also noted that under the scheme of the Texas Family Code, a divorce court is authorized to divide the separate and community property between the parties

in a just and equitable manner, and that

> (f)actors which the Texas courts may take into account in making the division and award "include the disparity of the earning power of the parties as well as their business opportunies ... the physical conditions of the parties, probable future need for support, and educational background: ... (t)he fault in breaking up the marriage and the benefits (the) innocent spouse would have received from a continuation of the marriage ....

506 F.2d at 1026, (emphasis in original), quoting Cooper v. Cooper, 513 S.W.2d 229, 233-34 (Tex.Civ.App.-Houston (1st Dist. 1974, no writ). The Court also observed that, under Texas law, the future support of a former spouse "can play a significant role in the divorce court's property division and that what may appear to be a mere division of assets may in fact, under a Texas decree, contain a substantial element of alimony-substitute, support or maintenance, however, termed," 506 F.2d at 624. Finally, this Court noted that the Texas Supreme Court has recognized that support payments, although considered alimony in other states, are not so characterized in Texas. See Francis v. Francis, 412 S.W.2d at 32-33. Consequently, this

Court determined that, for purposes of interpreting the federal bankruptcy laws, a federal court is not bound by the label that a state attaches to am award, but rather must look to its substance, and held that the award fell within the exception from discharge contained in section 17(a)(7). 506 F.2d at 1027.

Relying upon Nunnally, the district court in the case sub judice held that plaintiff's right to her share of defendant's retirement benefits was a nondischargeable obligation for "alimony due or to become due, or for maintenance or support" under section 17(a)(7). In Matter of Crist, 632 F.2d 1226 (5th Cir. 1980), which also involved the question of nondischargeability under section 17(a)(7), this Court stated:

> Under the relevant standard of review, findings of fact are not to be disturbed unless clearly erroneous. "The test ... is not whether a different conclusion from the evidence would be appropriate, but whether there is sufficient evidence in the record to prevent clear error in the trial judge's findings."

quoting Matter of Bardwell, 610 F.2d 228, 230 (5th Cir. 1980).

Defendant argues that, although correct at the time it was decided, Nunnally

has been undermined by subsequent decision holding that, for purposes of the federal government's consent to suit, a division of military retirement benefits in a Texas decree is not "alimony" within the meaning of the Social Security Act, 42 U.S.C. §§ 659, 662(c). See United States v. Stelter, 567 S.W.2d 797 (Tex 1978); see also Marin v. Hatfield, 546 F.2d 1230 (5th Cir. 1977). Defendant's reliance upon the principle espoused in Stelter and Marin is misplaced. First, it is significant that neither decision involves the Bankrupty Act; moreover, in neither decision did the Court mention, much less disapprove, this Court's decision in Nunnally.

(4) Of more substance is the fact that the rule expressed in Stelter and Marin is inapposite to the question presented in Nunnally and in the case sub judice. In Stelter and Marin the courts held that, for purposes of determining the extent of the federal government's consent to suit, military retirement benefits awarded under a Texas decree are not "alimony" under Texas law. In Nunnally, however, this Court addressed the separate and distinct question of whether, for purposes of applying the federal bankruptcy laws, such benefits, although not "alimony" under state law, nonetheless may contain a substantial element of "alimony-substitute, support or maintenance, however termed." 506 F.2d at 1024. The

Court's affirmative answer in Nunnally is supported both by reason and precedent. In Matter of Crist, 632 F.2d at 1232, this Court reiterated the well-established policy of "liberal construction of the Bankruptcy Act in light of the purpose of the provision under consideration." Also in Crist, this Court stated the purpose underlying section 17(a)(7) as follows:

> "The bankruptcy law should receive such an interpretation as will effectuate its beneficent purposes and will make it an instrument to deprive dependent wife and children of the support and maintenance due them from the husband and father, which it has ever been the purpose of the law to enforce."

632 F.2d at 1233; quoting Wetmore v. Markoe, 196 U.S. 68, 25 S.Ct. 172, 175, 176, 49 L.Ed. 390 (1904). The essence of this Court's decision in Nunnally is that, regardless of how a state may choose to define "alimony," a federal court, for purposes of applying the federal bankruptcy laws, is not bound to the label that a state affixes to an award, and that, consistent with the objectives of federal bankruptcy policy, the substance of the award must govern. 506 F.2d at 1027. In the present case, as in Nunnally, the award contains an element of "alimony substitute, support or maintenance, however

termed." 506 F.2d at 1024. Consequently, the district court's finding that plaintiff's right to her share of defendant's retirement benefits was nondischargeable under section 17(a)(7) is not clearly erroneous, and must be affirmed.

III.

(5) By way of alternative argument, defendant asserts that even if the section 17(a)(7) exemption from discharge applies to the award in this case, that statute nonetheless is unconstitutional, and an exemption from discharge should not be recognized. Defendant argues that section 17(a)(7) creates a gender-based classification in violation of the equal protection component of the fifth amendment because it exempts from discharge only those obligations "for alimony due or to become due, or for maintenance or support of wife or child ...." (emphasis added). This argument was raised in Matter of Crist, 632 F.2d 1226 (5th Cir. 1980). In Crist this Court acknowledged that the sex-based classification contained in section 17(a)(7) was constitutionally infirm, but held that the appropriate remedy was not to strike down the entire statute, but rather to extend the benefits of section 17(a)(7) to the excluded class, i. e., to allow both former husbands and wives receiving alimony or maintenance or support to assert the nondischargeability of the ex-spouse's obligation under sec-

tion 17(a)(7). Consequently, defendant's argument to the contrary must be rejected.

IV.

(6) Finally, defendant argues that because a bankruptcy court has jurisdiction to determine the dischargeability of a debt, the district court in the case sub judice erred in permanently enjoining defendant from proceeding against plaintiff for civil contempt in the Missouri bankrupty court. This argument cannot be sustained. Although subsection 17(a)(2) of the former Bankruptcy Act enumerated certain categories of debts for which dischargeability could be determined only in the bankruptcy court, and section 14(f)(2) provided for an injunction against proceedings in other courts to enforce those obligations, the 1970 amendments to the Act moved claims for alimony, maintenance and support from subsection 17(a)(2) to 17(a)(7), and thereby provided that, with regard to those claims, the bankruptcy court possessed only concurrent jurisdiction with other courts and no rent jurisdiction with other courts and no injunction prevented the subsequent assertion of those claims. See 1A Collier on Bankruptcy ¶¶14.69, 17.01, 17.18, 17.22A (14th ed.). Inasmuch as defendant's discharge did not operate to enjoin plaintiff from litigating the issue of nondischargeabilty under section 17(a)(7) in the present

action, defendant's civil contempt proceeding in the bankruptcy court constituted nothing more than an attempt to relitigate the district court's determination of nondischargeability in that forum. Consequently, once the district court in the case sub judice determined that defendant's obligation to plaintiff was not dischargeable, the court properly acted to prevent the relitigation of that issue in the bankruptcy court. 28 U.S.C. § 1652; see Villarreal v. Brown Express, Inc., 529 F.2d 1219, 1222 (5th Cir. 1976). Consequently, the district court did not err in enjoining defendant from proceeding against plaintiff in the bankrupty court.

AFFIRMED.

APPENDIX D

IN THE UNITED STATES

COURT OF APPEALS FOR THE FIFTH CIRCUIT

NEW ORLEANS, LOUISIANA

No. 79-4011

MARY FRANCES ERSPAN,

Plaintiff-Appellee, Cross-Appellant

vs.

LLOYD J. BADGETT,

Defendant-Appellant, Cross-Appellee

Petition for Rehearing En Banc

Stephen F. Hefner & Associates
109 West Houston Street
Sherman, Texas 75090

Attorney for Appellant

IN THE UNITED STATES

COURT OF APPEALS FOR THE FIFTH CIRCUIT

NEW ORLEANS, LOUISIANA

MARY FRANCES ERSPAN,	§	
	§	
Plaintiff-Appellee,	§	
Cross-Appellant	§	
	§	
VS.	§	CASE NO.
	§	79-4011
	§	
LLOYD J. BADGETT,	§	
	§	
Defendant-Appellant	§	
Cross-Appellee	§	

CERTIFICATE OF INTERESTED PERSONS

Certificate required by Fifth Circuit Local Rule 13.6.1:

The undersigned, counsel of record for Lloyd J. Badgett, certifies that the following listed parties are all non-governmental parties which have an interest in the outcome of the case.

Lloyd J. Badgett

Mary Frances Erspan

/s/
Stephen F. Hefner
Attorney of record for
Lloyd J. Badgett,
Appellant

STATEMENT OF COUNSEL

Statement required by Fifth Circuit Local Rule 16.2.2:

I express a belief, based on reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court: Hisquierdo v. Hisquierdo, 439 U.S. 572, 99 S.Ct. 802 (1979) and Orr v. Orr, 99 S.Ct. 1102 (1979).

I express a belief, based on reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance: (1) whether a state court has the power to divide military retirement benefits in a divorce proceeding; and (2) whether 11 U.S.C. Sec. 35(a)(7) contains gender based classification which invalidates the statute.

Table of Contents

Certificate of Interested Persons by Local Rule 13(6)(1) i

Statement of Counsel ii

Table of Authorities. 1

Statement of the Issues Considered to Merit en banc consideration 2

Statement of the Course of Proceedings and Disposition of the Case 3

Argument and Authorities 6

Conclusion 13

Certificate of Service 13

TABLE OF AUTHORITIES

Cases

California v. Webster, 430 U.S. 313, 97 S.Ct. 1192 (1977) 11

Craig v. Boren, 429 U.S. 190, 97 S.Ct. 451 (1976) 11

Francis v. Francis, 412 S.W.2d 29, 32 (Tex. 1967) 10

Hisquierdo v. Hisquierdo, 439 U.S. 572, 99 S.Ct. 802 (1979) 7, 8, 9, 13

In re Nunnally, 506 F.2d 1024 (5th Cir. 1975) 9, 10

Orr v. Orr, 99 S.Ct. 1102 (1979) . 10, 11 10, 11, 12, 13

Constitution

United States Constitution Article VI cl. 2 8

Text and Treatises

6 Am.Jur.2d, Attachment and Garnishment, §78 8

Statutes

10 U.S.C. §1431-1446 8

11 U.S.C. §35(a)(7) 5, 8,

9, 10, 11, 12, 13

37 U.S.C. §701(a) 7

45 U.S.C. §231(n) 7

STATEMENT OF THE ISSUE CONSIDERED TO MERIT EN BANC CONSIDERATION

1. Whether a state court has the power to divide military retirement benefits in a divorce proceeding.

2. Whether 11 U.S.C. §35(a)(7) contains gender based classification which invalidates the statute.

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

On February 21, 1963, a divorce was granted between the Plaintiff, Mary Frances Erspan, and Defendant, Lloyd J. Badgett, in Cause No. 102449, styled "Mary Frances Badgett, Plaintiff, vs. Lloyd J. Badgett, Defendant," in the 65th Judicial District Court of El Paso County, Texas. The divorce decree provided, inter alia, that the Defendant's accumulated right under a United States Army retirement benefits program was the joint property of the Plaintiff and the Defendant in equal parts. The Defendant was ordered to execute all documents required by any agency to accomplish the payment directly to the Plaintiff of her one-half share of each payment made after retirement of the Defendant. The Defendant was further made personally responsible to the Plaintiff for such payment in case it could not be made directly to Plaintiff by virtue of some rule or regulation of the agency paying same. In that event, the Defendant was ordered to send the payment to Plaintiff from such check as received by him.

Following the divorce between the parties, Defendant, Lloyd J. Badgett, retired from the United States Army. Defendant received retirement benefits from the United States Army based upon his twenty years of service therein. He was also given credit for reserve service in the

United States Army. Thus, Defendant has been paid military retirement benefits from the date of his retirement to the present based upon 22.7 years of service in the military. After his retirement from the United States Army, Defendant paid the Plaintiff one-half of his military retirement pay from the date of his retirement through March, 1967, when he ceased paying same to Plaintiff. Defendant has paid nothing to the Plaintiff since March, 1967, either flowing from the divorce decree rendered on February 21, 1963, or by virtue of the judgment granted to Plaintiff against Defendant for unpaid military retirement benefits on June 15, 1971, in Cause No. 70-1032-B, styled "Mary Frances Badgett Erspan vs. Lloyd J. Badgett," in the 158th Judicial District Court of Denton County, Texas. Plaintiff's judgment, in the amount of $8,606.28 for military retirement benefits received by Defendant but not passed to Plaintiff, was affirmed by the court of civil appeals on January 21, 1972. Badgett v. Erspan, 476 S.W.2d 381 (Tex.Civ.App. - Ft. Worth 1972, no writ).

On August 28, 1972, in Cause No. S-72-B-81, styled "In the Matter of Lloyd J. Badgett, Bankrupt," in the United States District Court for the Eastern District of Missouri, Southeastern Division, sitting in bankruptcy in St. Louis,

the Defendant filed a Petition in Bankruptcy listing, among other debts and claims, the judgment in the 158th Judicial District Court of Denton County, Texas, as well as the divorce decree rendered by the 65th Judicial District Court of El Paso County, Texas. Plaintiff filed no claim in said bankruptcy proceeding, nor made any appearance, nor filed any objection to the discharge of the Defendant though she was given legal notice of such proceedings through her attorney. On June 28, 1973, the Defendant obtained a discharge in bankruptcy, pursuant to §17 of the Bankruptcy Act of 1898, former 11 U.S.C. §35.

No execution has ever been requested or issued on the judgment rendered by the 158th Judicial District Court of Denton County, Texas. Between June 1, 1971 and the date of trial in the instant cause, Defendant received approximately $61,768.85 from the United States Army in payment of his retirement benefits.

Plaintiff filed her complaint initiating this litigation against Lloyd J. Badgett and the United States of America United States District Court for the Western District of Texas, El Paso Division on January 24, 1977. At the time of filing, Plaintiff was a resident of El Paso, Texas, and Defendant was a resident of Jackson, Missouri. Upon proper motion, the district court subsequently dismissed the United States of America as a party in

the cause. The case came to trial before the Hon. William S. Sessions, United States District Judge, on October 12, 1978, and judgment was rendered on November 3, 1979.

The judgment of the district court ordered that Defendant pay to Plaintiff one-half of all his military benefits accrued between June 10, 1971, and the date of Judgment, in the amount of $34,641.90 plus interest at the rate of nine per cent. per annum from the date of Judgment. Additionally, the district court ordered Defendant to execute and keep in full force and effect with the United States Army, an allotment order directing the United States Army to pay to Plaintiff one-half of all future retirement benefits payable to the Defendant. Plaintiff's Motion for Permanent Injunction against the Defendant to prevent him from proceeding with his contempt action in the bankruptcy court, in Cause No. S-72-B-81, was granted, and Defendant's renewed Motion to Dismiss was denied. Thereafter, Defendant timely filed his Notice of Appeal as to paragraphs 2 and 4 regarding the portion of the Judgment ordering Defendant to execute an allotment with the United States Army and the portion of the Judgment granting Plaintiff's Motion for Permanent Injunction.

The United States Court of Appeals, Fifth Circuit, Unit A, affirmed the judg-

ment of the District Court on June 10, 1981.

ARGUMENT AND AUTHORITIES

I.

The United States Court of Appeals, Fifth Circuit, erred in affirming the judgment of the District Court, by overlooking or misapprehending the fact that a state court does not have the power to divide military retirement benefits in a divorce proceeding.

A determination that a state can divide military retirement benefits directly conflicts with the United States Supreme Court decision in Hisquierdo v. Hisquierdo, 439 U.S. 572, 99 S.Ct. 802 (1979). In that case the husband was employed by a railway so that he was covered by the Railroad Retirement Act. He sued for divorce in California and his wife claimed a share of his retirement benefits under that Act as community property. The Act contains a provision to the effect that "no annuity...shall be assignable or be subject...to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated..." 45 U.S.C. 231n. The Supreme Court held that this provision preempts state community property law and prevents retirement benefits authorized by the Act from beind divided

on divorce. The Court found that the wife's claim conflicted with the express terms of the Act in such a way as to frustrate the objectives of the federal program. The Court thus found that the railroad retirement benefits could not be divided under community property laws without conflicting with the federal statutory scheme for allocating the benefits.

Following the reasoning of Hisquierdo, supra, the disposition of military retirement benefits as divisible marital property also conflicts with the federal statutory scheme. Under the supremacy clause of the United States Constitution, an inconsistent state law must yield. U.S. Constitution Article VI, cl. 2 and Hisquierdo, supra, the disposition of military retirement benefits as divisible marital property also conflilcts with the federal statutory scheme. Under the supremacy clause of the United States Constitution, an inconsistent state law must yeild. U.S. Constitution Article VI, cl. 2 and Hisquierdo, supra.

There is nothing unique in the structure of the railroad retirement system that makes in appropriate to limit Hisquierdo, supra, to railroad retirement benefits and not to extend its rationale to military retirement pay.

As discussed above, the Supreme Court, in Hisquierdo, placed great weight upon

the fact that 45 U.S.C. sec. 231n prohibits the assignment of, or levy upon, any annuity or supplement annuity.

The court stated that such provisions "ensure that the benefits actually reach the beneficiary." The military retirement program has similar provisions. The right to the pension and the retired pay not yet due and payable cannot be assigned, sold, transferred, conveyed, or pledged. See 37 U.S.C. sec. 701(a). Prior to payment to the retired serviceman the retired pay cannot be attached or garnished. See 6 Am.Jur.2d, Attachment & Garnishment sec. 78 & 79. Both the military and railroad retirement benefits are correlated to the social security system. In neither case is the statutory scheme for retirement contractual.

Further, Congress has expressed itself as fully in the military retirement pay area as it has in the Railroad Retirement Act context in rejecting the preservation of benefits for a divorced spouse. See 10 U.S.C. sec. 1431-1446.

Consequently, the state court improperly exercised jurisdiction in determining that the military retirement pay was divisible community property. To the extent that the divorce decree conflicts with the decision of the Supreme Court of the United States in Hisquierdo, supra, it should be reversed.

It must be further noted that pending

in the United States Supreme Court are the following cases:

Milhan v. Milhan, 613 P2d 812 (Calif. 1980),
No. 80-578; and,
McCarty v. McCarty (Calif.) No. 80-5;
and,
Russell v. Russell, 605 SW2d (Ken. 1980),
No. 80-1132; and,
Wall v. Donovan, (Calif.)
No. 80-1628;

on which application for Writ of Certiorari has been granted to determine whether a state court has the power to divide, in a divorce proceeding, military retirement benefits.

II.

The United States Court of Appeals, Fifth Circuit, erred in holding that 11 U.S.C. Sec. 35(a)(7) is not unconstitutional on equal protection grounds.

In the case of In re Nunnally, 506 F.2d 1024 (5th Cir. 1975), this court held that the divorce court's award to the former wife of forty-eight percent (48%) of her former husband's Navy retirement benefits was non-dischargeable in bankruptcy. The former husband contended that the award to his former wife could not be characterized as being alimony, since under Texas Law there is no permanent ali-

mony. See: Francis v. Francis, 412 S.W.2d 29, 32 (Tex. 1967). But in Francis, the Texas Supreme Court also held that awards of support payments were allowable, stating as follows:

> "Support payments ordered to be made after the divorce from the income from the husband's property, although considered alimony in many jurisdictions, is not considered alimony in this State." Id., at 32-33.

This Court agreed with the former husband's contention that the award to his former wife could not be characterized as being alimony. This Court, however, upheld the award by classifying it as being an award of support. Being a valid support award, the debt created by the Divorce Decree was held to be non-dischargeable in bankruptcy.

While this Court may have correctly decided the Nunnally case based on the law as it appeared to exist in 1975, the law has since undergone considerable clarification, and these clarifications of the law necessitate a re-evaluation by this Court of its Nunnally decision.

In 1979, the Supreme Court of the United States decided the case of Orr v. Orr, 99 S.Ct. 1102 (1979), wherein the Court invalidated the alimony divorce statutes of Alabama. The Court held that the statutes were constitutionally defec-

tive on the grounds of sex discrimination. Husbands, but not wives, could be required to pay alimony under the Alabama statutes.

Former 11 U.S.C., §35(a)(7) contains the same constitutional defect as the Alabama alimony statutes. The statute states in pertinent parts as follows:

> "A discharge in bankruptcy shall release a bankrupt from all his provable debts, whether allowable in full or in part, except such as are for . . . maintenance or support for wife or child . . . ." (Emphasis supplied).

Clearly there is a gender-based classification in the statute that operates to the disadvantage of males. With respect to sex discrimination against men, the Supreme Court has stated:

> "The fact that the classification expressly descriminates against men rather than women does not protect it from scrutiny." See: Orr v. Orr, 99 S.Ct. 1102, 1111 (1979), citing Craig v. Boren, 429 U.S. 190, 97 S.Ct. 451 (1976).

The Supreme Court has further held that, "'to withstand scrutiny' under the Equal Protection Clause,"' classifica tions by gender must serve important governmental objectives and must be substantially re-

lated to achievement of those objectives.'" Orr, at 1111, quoting from Califano v. Webster, 430 U.S. 313, 316-17, 97 S.Ct. 1192, 1194 (1977).

In Orr, three governmental interests were advanced as being sufficiently important to withstand scrutiny under the Equal Protection Clause of the United States Constitution. These interests were: (1) "the State's preference for an allocation of family responsibilities under which the wife plays a dependent role, and as seeking for their objective the reinforcement of that model among the State's citizens." Id., at 1111; (2) the interest in providing financial assistance to the wife of a broken marriage; (3) the "goal of compensating women for past discrimination during marriage, which assertedly has left them unprepared to fend for themselves in the working world following divorce." Id., at 1112. The first interest advanced by the appellant was held not to be sufficiently important. While the Orr court held that the latter two interests were important governmental objectives, it held that the classification at issue was not substantially related to achievement of those objectives. As a result, the Alabama alimony statutes were struck down.

In the case at hand, Appellant asserts that there are no sufficiently important governmental interests or objectives which would justify the gender-based classifica-

tion found in 11 U.S.C., §35(a)(7). If that is true, then the component phrase of 11 U.S.C., §35(a)(7), which the court used in the Nunnally case to uphold the award to the former wife is constitutionally defective and must be struck down.

CONCLUSION

Based on the United States Supreme Court decision in Hisquierdo v. Hisquierdo, 439 U.S. 572, 99 S.Ct. 802 (1979) the state court improperly exercised jurisdiction in determining that the military retirement pay was divisible community property.

In the alternative, in light of Orr v. Orr, 99 S.Ct. 1102 (1979) the gender based discrimination contained in 11 U.S.C. Sec. 35(a)(7) should be declared unconstitutional. Being unconstitutional, this Court should declare that the obligations owed by Appellant on the date of filing of said bankruptcy were discharged by the Order of Discharge issued to the Appellant by the Bankruptcy Court.

Respectfully submitted,

STEPHEN F. HEFNER &
ASSOCIATES
109 West Houston Street
Sherman, Texas 75090

BY: /s/
Stephen F. Hefner

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a copy of the above and foregoing Petition for Rehearing has been mailed, by me, to Mr. Colbert N. Coldwell, Peticolas, Luscombe, Stephens & Windle, 12E El Paso National Bank Building, El Paso, Texas 79701, on this the _____ day of June, 1981.

/s/
Stephen F. Hefner

APPENDIX E

MARY FRANCES ERSPAN,

Plaintiff-Appellee, Cross-Appellant
vs.

LLOYD J. BADGETT,

Defendant-Appellant, Cross-Appellee
No. 79-4011

Oct. 9, 1981

ON SUGGESTION FOR REHEARING EN BANC

(Opinion June 10, 1981, 5th Cir., 1981, 647 F.2d 550.)

Before AINSWORTH and SAM D. JOHNSON, Circuit Judges, and HUNTER, District Judge.

PER CURIAM:

Following the issuance of the panel opinion in this case, Defendant Badgett filed a Suggestion for Rehearing En Banc, in which he now argues, inter alia, that under the authority of the Supreme Court's decision in Hisquierdo v. Hisquierdo, 430 U.S. 572, 99 S.Ct. 802, 50 L.Ed.2d 1 (1979), in which the Court held that Railroad Retirement Act benefits are not divisible as community property in state court divorce decrees, federal law likewise

should be held to preclude state courts from dividing military retirement benefits in divorce proceedings pursuant to state community property laws. In his Suggestion, defendant also notes that the Supreme Court agreed to decide this precise question in McCarty v. McCarty, argued 49 U.S.L.W. 3661 (March 2, 1981). Defendant asserts that "(t)o the extent that the divorce decree conflicts with the decision of the Supreme Court of the United States in Hisquierdo, ... it should be reversed."

(1,2) Two days after defendant filed his Suggestion in the case sub judice, the Supreme Court announced its opinion in McCarty v. McCarty, __U.S.__, 101 S.Ct. 2728, 69 L.Ed.2d ___1981), in which the Court held that military retirement benefits, like railroad retirement benefits, are not divisible in state court decrees as community property, and accordingly reversed the judgment of the California Court of Appeal, which had affirmed the award. Unlike both McCarty and Hisquierdo, however, which were direct appeals from state court divorce decrees, there case sub judice is not: there is no divorce decree before this Court. Moreover, notwithstanding defendant's invitation for the Court to "reverse" the February 21, 1963 judgment of the 65th Judicial District Court of El Paso County,

Texas, we have no such jurisdiction. Defendant advances no reason why that judgment should be denied its usual res judicata effect, and none is readily apparent: as a final judgment, it settles not only the issues actually litigated, but also any issues that could have been litigated in that proceeding. Federated Department Stores, Inc. v. Moitie, ___U.S.__ , 101 S.Ct. 2424, 2427, 69 L.Ed.2d 103 (1981). Furthermore, as the Supreme Court noted in Federated Department Stores, "the res judicata consequences of a final, unappealed judgment on the merits (are not) altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." __U.S.__, 101 S.Ct. 2427 (citations omitted). Nothing in McCarty suggests that the Supreme Court therein intended to invalidate, or otherwise render unenforceable, prior valid and subsisting state court judgments. Absent some indication of such an intent, we deline to do so.

Similarly, defendant's argument that 37 U.S.C. § 701(a) evinces a congressional intent that military retirement benefits be exempt from division on divorce as community property is of no avail. For the reasons stated supra, this issue is not properly before this Court. Finally, we note that although it might be argued that, after McCarty, section 701(a) should be read to prevent "anticipation" of an

officer's pay account by assignment, compare __U.S. at __, 101 S.Ct. at 2739 n.22 with id. at __, 101 S.Ct. at 2746 (Rehnquist, J., dissenting), the district court's order requiring defendant to file an allotment order with the Army providing for the payment directly to plaintiff of her share of defendant's retirement benefits was based not upon section 701(a), but rather upon section 701(d), which specifically authorizes the Secretary to allow a member of the Army or the Air Force to make such allotments "for the support of his relatives, or for any other purpose that the Secretary concerned considers proper." Id. As noted in the panel opinion in the present case, the Office of the Judge Advocate General, Department of the Army, informed counsel by leter that the Department of Defense Military Pay and Allowances Entitlements Manual was amended on December 19, 1977 to permit retired members of the military to authorize allotments to former spouses. Absent any argument that the Secretary exceeded his authority in authorizing such allotments, or that the district court's order requiring defendant to execute such an allotment was otherwise improper, we decline to set that order aside.

No member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35,

Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1980), the Suggestion for Rehearing En Banc is

DENIED.

AINSWORTH, Circuit Judge, dissenting:

This case presents the important question of whether the Supreme Court's recent decision in McCarty v. McCarty, __US.__, 101 S.Ct. 2728, 69 L.Ed.2d ___ (1981), applies where a state court's judgment dividing military retirement benefits pursuant to state community property laws antedates McCarty, but where the right to receive some or all of the benefits so divided does not accrue until after the date of that decision. Because the court's decision today would result in unequal treatment of similarly situated individuals, I would reverse the district court's judgment in part, and hold that plaintiff is entitled to share only those military retirement benefits payable before June 26, 1981.

I joined in the original panel opinion affirming the district court decision to enforce the terms of a 1963 divorce decree awarding plaintiff one-half of defendant's accumulated right under a United States Army retirement benefits program. Erspan v. Badgett, 647 F.2d 550 (5 Cir. 1981).

Two weeks after that opinion was issued, the Supreme Court held in McCarty that federal law precludes a state court from dividing military retired pay pursuant to state community property laws. This court now holds that the 1963 state court judgment granting plantiff one-half of defendant's military retirement benefits enjoys res judicata effect, even though the legal principle on which that judgment rested has been overruled.

The court correctly observes that, as a general rule, the res judicata consequences of a final, unappealed judgment on the merits are not altered by the fact that the judgment rested on a legal principle subsequently overruled in another case. Federated Department Stores, Inc. v. Moitie, ___U.S.___, 101 S. Ct. 2424, 2427, 69 L.Ed.2d 103 (1981). This rule is not, however, inflexible. In Jackson v. DeSoto Parish School Board, 585 F.2d 726 (5th Cir. 1978) the Fifth Circuit stated:

> "It has long been established that res judicata is no defense where, between the first and second suits, there has been an intervening change in the law or modification of significant facts creating new legal conditions. See, e. g., Commissioner of Internal Revenue v. Sunnen, 1948, 333 U.S. 591, 599-602, 68 S.Ct. 715, 720-21, 92 L.Ed. 898, 906-08; State Farm Mutual Automo-

bile Insurance Co. v. Duel, 1945, 324 U.S. 154, 162 65 S.Ct. 573, 577, 89 L.Ed. 812, 819. In these cases, the operation of the preclusion doctrines would result in unequal treatment of similarly situated individuals, some of whom have the misfortune to have sought legal redress at an earlier phase of legal developments."

Id. at 729.

A subsequent change in the law has been held to negate the res judicata effect of a number of decision adjudicating constitutional rights. See, e. g., Jackson v. DeSoto Parish School Board, supra; Parnell v. Rapides Parish School Board, 563 F.2d 180, 185 (5th Cir. 1977), cert. denied, 438 U.S. 915, 98 S.Ct. 3144, 57 L.Ed.2d 1160 (1978); Christian v. Jemison, 303 F.2d 52, (5 Cir.) cert. denied 371 U.S. 920, 83 S.Ct. 287, 9 L.Ed.2d 229 (1962). A subsequent change in the law should also negate the res judicata effect of a decision where, and to the extent that, (1) the rights adjudicated in that decision do not accrue until after the intervening change in the law has occurred, and (2) the operation of res judicata would result in unequal treatment of similarly situated individuals.

Both circumstances are present here. Many residents of community property states who will receive military retirement benefits after the date of McCarty

have obtained or will obtain a judgment of divorce. Under the present ruling an essentially fortuitous circumstance - whether their judgment of divorce was entered before or after the date of McCarty - will determine whether those individuals may be compelled by state community property laws to pay, in the years following McCarty, part of their military retirement benefits to their former spouse. Because such unequal treatment is neither necessitated nor justified by the doctrine of res judicata, I am unable to join in the panel opinion herein.

APPENDIX F

IN THE UNITED STATES

COURT OF APPEALS FOR THE FIFTH CIRCUIT

NEW ORLEANS, LOUISIANA

No. 79-4011

MARY FRANCES ERSPAN,

Plaintiff-Appellee, Cross-Appellant

vs.

LLOYD J. BADGETT,

Defendant-Appellant, Cross-Appellee

Motion For Stay Of Mandate

Stephen F. Hefner & Associates
109 West Houston Street
Sherman, Texas 75090

Attorney for Appellant

IN THE UNITED STATES

COURT OF APPEALS FOR THE FIFTH CIRCUIT

NEW ORLEANS, LOUISIANA

MARY FRANCES ERSPAN,	§	
	§	
Plaintift-Appellee,	§	
Cross-Appellant	§	
	§	
VS.	§	CASE NO.
	§	79-4011
	§	
LLOYD J. BADGETT,	§	
	§	
Defendant-Appellant,	§	
Cross-Appellee	§	

MOTION FOR STAY OF MANDATE

TO THE HONORABLE JUDGE OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT:

Defendants-Appellees respectfully present this, their application for, and move the Court to enter, an order staying the issuance of mandate in this case, under the provisions of Section 2101(f), Title 28, United States Code, and pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, because it is the bona fide intention of said appellees to make proper and timely application to the Supreme Court of the Untied States for writ of certiorari.

The grounds upon which said petition for certiorari will be based are substantially as follows:

(1) The decision of the Court of Appeals for the Fifth Circuit allowing the state court to divide the military retirement pay as community property in a divore proceeding, is in conflict with the decision of the United States Supreme Court in Hisquierdo v. Hisquierdo, 439 U.S. 572, 99 S.Ct. 802 (1979).

(2) The decision of the Court of Appeals for the Fifth Circuit upholding the validity of 11 U.S.C. Sec. 35(a)(7) is in conflict with the decision of the United States Supreme Court in Orr v. Orr, 99 S.Ct. 102 (1979).

WHEREFORE, appellees move the Court for an order staying the issuance of mandate herein pending the filing by them of a petition for certiorari in the Supreme Court and until final disposition therein of the case.

In support hereof appellees attach the statement of counsel.

Respectfully submitted,

STEPHEN F. HEFNER &
ASSOCIATES
109 West Houston Street
Sherman, Texas 75090

BY: /s/_____
Stephen F. Hefner
Attorney for Defendant/
Appellant

I hereby certify that it is the bona fide intention of the appellant to make application to the Supreme Court of the United States for a writ of certiorari within the time provided for by law, and that I believe that there is merit in appellant's case, and that the judgment of the United States Court of Appeals ought to be reversed by the Supreme Court of the United States.

/s/_____
Stephen F. Hefner

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a copy of the above and foregoing Petition for Rehearing has been mailed, by me, to Mr. Colbert N. Coldwell, Peticolas, Luscombe, Stephens & Windle, 12E El Paso National Bank Building, El Paso, Texas 79701, on this the _____ day of May, 1980.

/s/_____
Stephen F. Hefner

APPENDIX G

October 29, 1981

Mr. Stephen F. Hefner
Attorney at Law
109 West Houston Street
Sherman, Texas 75090

No. 79-4011 - Erspan v. Badgett

MANDATE STAYED TO AND INCLUDING
NOVEMBER 28, 1981

Dear Counsel:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the Clerk of this Court a notice from the Clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition fro writ of certiorari, the mandate shall issue immediately under Rule 41, F.R.A.P.

Under revised Rule 19.1 of the Supreme Court, effective June 30, 1980, a request to certify the record prior to action by the Supreme Court on the petition for certiorari should not be made as a matter of course but only when the record is deemed essential to a proper understanding of the case by that Court.

A copy of the opinion, judgment and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,

GILBERT F. GANUCHEAU,
Clerk

BY: /s/ Betty G. Martinez
Deputy Clerk

Encls.

cc: Mr. Colbert N. Coldwell

APPENDIX H

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

EL PASO DIVISION

MARY FRANCES ERSPAN,	§	
	§	
Plaintiff	§	
	§	
VS.	§	NO. EP-77-CA-18
	§	
LLOYD J. BADGETT,	§	
AND UNITED STATES	§	
OF AMERICA,	§	
	§	
Defendants	§	

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

The above-styled and numbered cause has been regularly called on the docket of this Court for trial before the Court without a jury. Thereafter, the Court having duly considered the evidence and summation of counsel, as well as the applicable law, hereby makes its Findings of Fact and Conclusions of Law as requried pursuant to the provisions of Rule 52 of the Federal Rules of Civil Procedure:

FINDINGS OF FACT

1. On February 21, 1963, a divorce was granted by and between the Plainiff, MARY FRANCES ERSPAN, and the Defendant, LLOYD J. BADGETT, in Cause No. 102449, styled "Mary Frances Badgett, Plaintiff v. Lloyd J. Badgett, Defendant," in the 65th Judicial District Court of El Paso County, Texas.

2. The divorce decree in El Paso, Texas, rendered in the above-mentioned Cause No. 102449, provided, in pertinent part, as follows:

> "IT IS THE FURTHER JUDGMENT AND ORDER of this Court that the accumulated rights to a pension from the United States Army after retirement commonly known as Retirement Benefits hereby are declared and are community property and are hereby declared the joint property of the Plaintiff and the Defendant in equal parts and the Defendant is further ORDERED to execute all documents required by any agency to accomplish the payment directly to the Plaintiff of her one-half share of each payment made after retirement of the Defendant and the Defendant is hereby made personally responsible to the Plaintiff for such

payment in case it cannot be made directly to her by virtue of some rule or regulation of the agency paying same; then and in that event, only, the Defendant is ORDERED to send it to Plaintiff from such check as received by him one-half of such sum."

3. Plaintiff, MARY FRANCES ERSPAN, is a legal resident of and is domiciled in El Paso County, Texas.

4. Defendant, LLOYD J. BADGETT, is a legal resident of and domiciled in Jackson, Missouri.

5. Following the divorce between the parties herein, the Defendant, LLOYD J. BADGETT, retired from the United States Army.

6. The Defendant, LLOYD J. BADGETT has received retirement benefits from the United States Army for his 20 years of service, plus being given credit for reserve service in the United States Army, and is, therefore, being paid military retirement benefits from the date of his retirement to the present based upon 22.7 years of service in the military.

7. The Defendant, LLOYD J. BADGETT, after retiring from the United States Army, paid the Plaintiff, MARY FRANCES ERSPAN, one-half of his military retirement benefits from the date of his retirement through March, 1967, when he ceased paying same to Plaintiff herein. Defen-

dant has never resumed payments to Plaintiff.

8. Defendant, LLOYD J. BADGETT, has paid nothing to the Plaintiff, MARY FRANCES ERSPAN, since March, 1967, either as a result of the divorce decree rendered on February 21, 1963, or by virtue of the judgment granted to Plaintiff against Defendant on June 15, 1971 in Cause No. 70-1032-B, styled "Mary Frances Badgett Erspan v. Lloyd J. Badgett," in the 158th Judicial District Court of Denton County, Texas.

9. Following his retirement, Defendant, LLOYD J. BADGETT, obtained employment and lived at various locations from June, 1963 through August, 1971.

10. Between September, 1968 and August, 1971, Defendant, LLOYD J. BADGETT, lived at three locations while he was pursuing a college degree, including Hattiesburg, Mississippi; Norman, Oklahoma; and Denton, Texas.

11. After completion of his college degree, the Defendant, LLOYD J. BADGETT, obtained employment as a college teacher in Jackson, Missouri, where he presently resides.

12. On June 15, 1971, Plaintiff obtained a judgment against Defendant, LLOYD J. BADGETT, in Cause No. 70-1032-B, styled "Mary Frances Badgett Erspan v. Lloyd J.

Badgett," in the 158th Judicial District Court of Denton County, Texas. Plaintiff's judgment, in the amount of $8,606.28, was affirmed by the Texas Court of Civil Appeals on January 21, 1972. Badgett v. Erspan, 476 S.W.2d 381 (Tex.Civ.App.-- Ft. Worth, 1972, no writ). Defendant has not paid Plaintiff this judgment.

13. On August 28, 1972, in Cause No. S-72-B-81, styled "In the Matter of the Marriage of Lloyd J. Badgett, Bankrupt" in the United States District Court for the Eastern District of Missouri, Southern Division, Sitting in Bankruptcy, St. Louis, Missouri, the Defendant, Lloyd J. Badgett, filed a petition in bankruptcy listing, among other debts and claims, the judgment in the 158th Judicial District Court of Denton County, Texas, as well as the divorce decree rendered by the 65th Judicial District Court of El Paso County, Texas. Plaintiff filed no claim in said bankruptcy proceedings, nor made any appearance whatsoever, nor filed any objection to the discharge of the Defendant, LLOYD J. BADGETT, in said bankruptcy proceedings.

14. On June 28, 1973, the Defendant, LLOYD J. BADGETT, obtained a discharge in bankruptcy in Cause No. S-72-B-81 in the United States District Court for the Eastern District of Missouri, Southern Divi-

sion.

15. Following the divorce between Plaintiff and Defendant, Defendant married Thelma Faye Badgett, who died in August, 1977.

16. From the date of the divorce between Plaintiff and Defendant, Defendant, who is now married, supported himself by his wages, and his wife also worked until the date of her death. Defendant also received retirement benefits from the United States Army, but these retirement benefits do not constitute wages. Defendant's wages and retirement benefits constituted the sole support of Defendant and his wife, Thelma Faye Badgett, until the date of her death.

17. After the divorce between Plaintiff and Defendant, Plaintiff remarried. Plaintiff's present husband was then in the United States Army, and Plaintiff was also employed.

18. Plaintiff did not support either one of the two minor children born to Plaintiff and Defendant after each child had attained majority, and Plaintiff and her present husband have no children.

19. The youngest child born to Plaintiff and Defendant attained majority of age shortly prior to the termination of payments by Defendant, LLOYD J. BADGETT, to Plaintiff in March, 1967.

20. No execution has ever been re-

quested or issued on the judgment rendered by the 158th Judicial District Court of Denton County, Texas, although an abstract of judgment was issued to Tom Jester, a Denton attorney, on March 17, 1972.

21. The amount in controversy in the instant lawsuit exceeds $10,000.00.

22. Defendant, LLOYD J. BADGETT, has not converted any money owed to Plaintiff under the divorce decree rendered in the 65th Judicial District Court of El Paso County, Texas, but Defendant, LLOYD J. BADGETT, is liable to Plaintiff for one-half of the retirement pay benefits which he has received since March, 1967.

23. Any taking by Defendant, LLOYD J. BADGETT, of any share of Defendant's Army retirement pay awarded to Plaintiff, MARY FRANCES ERSPAN, in the divorce decree on February 21, 1963 in the 65th Judicial District Court of El Paso County, Texas, was not done by Defendant, LLOYD J. BADGETT, with fraud, malice and/or oppression, but was upon the advice of counsel.

24. Between June 1, 1971, and the date of trial herein, Defendant, LLOYD J. BADGETT, received approximately $61,768.85 from the United States Army in payment of his retirement benefits, one-half of which Defendant is obligated to remit to Plaintiff, MARY FRANCES ERSPAN.

CONCLUSIONS OF LAW

1. Diversity of citizenship exists

between Plaintiff and Defendant pursuant to 28 U.S.C. § 1332 because Plaintiff is a citizen of the State of Texas and Defendant is a citizen of the State of Missouri, and the amount in controversy exceeds $10,000.00.

2. Military pension benefits earned during marriage are community property and are subject to division upon divorce even though some benefits are payable and receivable in the future. Cearley v. Cearley, 544 S.W.2d 661 (Tex. 1976).

3. Plaintiff's First Amended Complaint, in which she seeks receivership, guardianship orders against Defendant, damages for conversion and exemplary damages, is not barred under 11 U.S.C. § 35 because of the Discharge in Bankruptcy granted to the Defendant, LLOYD J. BADGETT, in Cause No. S-72-B-81, styled "In the Matter of Lloyd Judson Badgett, Bankrupt," in the United States District Court for the Eastern District of Missouri, Southeastern Division.

4. When the Community Military Retirement Benefits are before the divorce court, as was the case in the divorce rendered between the parties by the 65th Judicial District Court of El Paso County, Texas, that Court should take them into consideration with all of the properties subject to a "just and right" division. The divorce court is given broad power,

under the "just and right" provisions of Tex.Family Code Ann. § 3.63, and a judgment dividing the property on that basis shall not be disturbed in the absence of an abuse of discretion. McKnight v. McKnight, 543 S.W.2d 863 (Tex. 1976).

5. Under 27 U.S.C. § 1738 "federal courts are required to give full effect to the final judgments of state courts, . . . " Hazen Research, Inc. v. Omega Materials, Inc., 497 F.2d 151, 153 (5th Cir. 1974).

6. A final decree of divorce rendered in one state should have the same credit, validity and effect, in every other court in the United States, which it had in the state where it was pronounced, Hampton v. McConnell, 16 U.S. (3 Wheat.) 234, 235, 4 L.Ed. 378 (1818), as long as the jurisdictional facts, including domicile, are validly established whenever the decree is questioned. Williams v. State of North Carolina, 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279 (1942).

7. The judgment obtained by Plaintiff in Cause No. 70-1032-B, styled "Mary Frances Badgett Erspan v. Lloyd J. Badgett," in the 158th Judicial District Court of Denton County, Texas is not discharged by Defendant's adjudication of bankruptcy in Missouri. In re Nunnally, 506 F.2d 1024 (5th Cir. 1975).

8. Plaintiff, MARY FRANCES ERSPAN, is entitled to receive one-half of Defen-

dant, LLOYD J. BADGETT'S, military retirement benefits which he has accrued between June 10, 1971 and the present. Plaintiff's one-half share is $34,641.90.

9. Plaintiff, MARY FRANCES ERSPAN, is not entitled to recover attorney's fees or exemplary damages herein.

10. All Findings of Fact herein may be considered Conclusions of Law, if appropriate, and vice versa. All Findings of Fact and Conclusions of Law not made specifically herein are deemed made in support of judgment for the Plaintiff, MARY FRANCES ERSPAN.

November 3, 1979

William S. Sessions /s/
WILLIAM S. SESSIONS
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

EL PASO DIVISION

MARY FRANCES ERSPAN,	§	
	§	
	§	
	§	
V.	§	NO. EP-77-CA-18
	§	
LLOYD J. BADGETT,	§	
	§	
AND	§	
	§	
UNITED STATES	§	
OF AMERICA,	§	
	§	
Defendants.	§	

JUDGMENT

In accordance with the Findings of Fact and Conclusions of Law rendered in the above-styled and numbered cause on this date,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

(1) Defendant, LLOYD J. BADGETT, shall pay to Plaintiff, MARY FRANCES ERSPAN, one-half of all of his military retirement benefits accrued between June 10, 1971 and the present, in the amount of

$34,641.90, plus nine percent (9%) per annum from the date of this judgment;

(2) Defendant, LLOYD J. BADGETT, shall execute and keep in full force and effect with the United States Army an allotment order directing the United States Army to pay to Plaintiff, MARY FRANCES ERSPAN, one-half of all future retirement benefits payable to Defendant, LLOYD J. BADGETT, to Plaintiff directly;

(3) Defendant's renewed Motion to Dismiss is hereby DENIED; and

(4) Plaintiff's Motion for Permanent Injunction against the Defendant to prevent Defendant from proceeding with his contempt action in Cause no. S-72-B-81, in the United States District Court for the Eastern District of Missouri, Southeastern Division, is hereby GRANTED.

November _____, 1979.

/s/_____
WILLIAM S. SESSIONS
United States
District Judge

APPENDIX I

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE WESTERN DISTRICT OF TEXAS

EL PASO DIVISION

MARY FRANCES ERSPAN,	§	
	§	
	§	
	§	
V.	§	NO. EP-77-CA-18
	§	
LLOYD J. BADGETT,	§	
	§	
AND	§	
	§	
UNITED STATES OF AMERICA,	§	
	§	
	§	
Defendants	§	

NOTICE OF APPEAL

Notice is hereby given that Lloyd J. Badgett, Defendant above named, hereby appeals to the United States Court of Appeals for the 5th Circuit from the Final Judgment entered in this action of the 3rd day of November, 1979, to the extend of numbered paragraphs 2, 3, and 4 thereof.

Respectfully submitted,

STEPHEN F. HEFNER &
ASSOCIATES
109 West Houston Street
Sherman, Texas 75090

BY: /s/_____
Stephen F. Hefner

Attorney for
Defendant

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a copy of the above and foregoing Notice of Appeal has been mailed, by me, certified mail return receipt requested, to Mr. Colbert N. Coldwell, Peticolas, Luscombe, Stephens, & Windle, 12E El Paso National Bank, El Paso, Texas 79901, on this the _____day of November, 1979.

/s/_____
Stephen F. Hefner

APPENDIX J

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

EL PASO DIVISION

MARY FRANCES ERSPAN,	§	
	§	
Plaintiff	§	
	§	
VS.	§	NO. EP-77-CA-18
	§	
LLOYD J. BADGETT,	§	
AND UNITED STATES	§	
OF AMERICA,	§	
	§	
Defendant	§	

MARY FRANCES ERSPAN'S RESPONSE TO LLOYD J. BADGETT'S MOTION TO DECLARE APPELLANT PURGED OF HIS CONTEMPT, OR, IN THE ALTERNATIVE, MOTION TO AMEND PREVIOUS CONTEMPT ORDER, OR, IN THE ALTERNATIVE, MOTION FOR STAY OF PREVIOUS CONTEMPT ORDER, AND MOTION FOR ASSESSMENT OF PREVIOUS CONTEMPT FINE AND MOTION FOR ISSUANCE OF ORDER TO SHOW CAUSE AND FOR CONTEMPT JUDGMENT

Comes now MARY FRANCES ERSPAN, Plain-

tiff, and files this, her Response to the Motion to Declare, etc., most recently filed by LLOYD J. BADGETT, Defendant, in the above entitled and numbered cause, and in response thereto would state contrary to the grounds stated in Paragraph II thereof:

A.

The Order on Stay Pending Appeal dated December 6, 1979, is sought to be attacked collaterally by LLOYD J. BADGETT, Defendant, after it was approved by him through his attorney. That order requires LLOYD J. BADGETT, Defendant, to effect an allotment order to pay to the Clerk "one-half of all future retirement benefits payable" to him pending appeal. The apparent purpose of the Order is to preserve the res of the lawsuit and to obviate the need for supercedeas bond. This Order required no "interpretation" as to whether it referred to "gross" or "net" benefits; it states one-half of all benefits payable, not paid. LLOYD J. BADGETT, Defendant has advanced his contention on the "gross" or "net" interpretation and same was overruled by the Court for reason that he proposes to surrender only one-half of the net proceeds after deduction for his taxes and other withholdings. Finally, the December 6, 1979 Order is not ambiguous so as to require interpretation: all benefits payable means "gross" - if it meant net

benefits payable it would have to so state.

B.

The Contempt Order is the response of the District Court to disobedience of the December 6, 1979 Order, which is entered to preserve the res during appeal. LLOYD J. BADGETT, Defendant, complains of the Order when it was approved by him. The District Court has power to punish for contempt of its Order which was granted pursuant to Rule 62(a), (c) and (d) although the Appellate court has concurrent power under Rule 62(g). Therefore, the District Court has not usurped Appellate jurisdiction.

C.

The Decree of Divorce declares that the retirment benefits in question are the community property of the parties and the joint property of the parties and LLOYD J. BADGETT, Defendant, was there ordered to make an allotment to accomplish the payment to MARY FRANCES ERSPAN, Plaintiff, of her one-half share thereof. There is again no interpretation required of this Decree, nor is it in conflict with the Findings and Fact and Conclusions of Law or with the Contempt Order. Rather than usurp Appellate jurisdiction, the Contempt Order preserves the res of the appeal.

D.

LLOYD J. BADGETT, Defendant, seeks

relief from a Contempt Order granted because of his violation of an Order on Stay Pending Appeal dated December 6, 1979. By granting relief from his own contempt this Court will undermine the security of the preservation of the res pending appeal. If he is incarcerated for his contempt, he may be entitled to bond pending appeal on Habeas Corpus. Such bond should be conditioned also to require payment for the res of the Order on Stay Pending Appeal in the event he should fail to deposit the sums required.

E.

The Bankruptcy Court in Arkansas, on its own motion, abstained from entering the fray. See attached Order dated March 31, 1981, to which reference is here made for the full particulars thereof as though set out herein verbatim. Therefore, the United States District Court of the Western District of Texas continues to have jurisdicition concerning the Order on Stay Pending Appeal dated December 6, 1979, and the enforcement thereof pursuant to Rule 62.

F.

MARY FRANCES ERSPAN, Plaintiff, objects to paragraph II F. of LLOYD J. BADGETT'S Motion to Declare, etc., for reason that same is too general and fails to apprise of the means by which enforcement of the Contempt Order would in any

way violate a constitutional right of LLOYD J. BADGETT, Defendant, which she denies.

G.

MARY FRANCES ERSPAN, Plaintiff, denies that LLOYD J. BADGETT, Defendant, has purged himself of contempt of Court by the means alleged by him because he has failed to allege purging himself of contempt by the means designated in the Court's Order of Contempt dated January 22, 1981, in that he has failed:

1. To pay into the Registry of the Court of the District Court the deficiency of $1,818.23 owed by him as of October 8, 1980, pursuant to the Order on Stay Pending Appeal. From December, 1979, to October, 1980, LLOYD J. BADGETT, Defendant, alleges payment of only the amount owed for the month of December, 1979, out of the total deficiency found by the Court in its Order of Contempt in the amount of $1,818.23 deficiency. In point of fact, he paid only $443.22 on April 27, 1981, rather than one-half of the gross amount received by him, which was $559.02. In any event he is $1,375.01 short on paying the deficiency.

2. To pay into the Registry of the Clerk of the District Court any and all deficiencies that may be due and owing by LLOYD J. BADGETT, Defendant, between the amount actually paid by him since October

8, 1980, and one-half of military retirement benefits paid to him from then to date of his Motion to Declare, etc. Specifically, he is in default from October 8, 1980, to April 25, 1981, as shown in the following table, to-wit:

Date Paid End of Mo.	Retirement Benifits	One-Half	Amt. Paid to Clerk	Deficiency
Oct., 1980	$1276.39	638.19	466.02	172.17
Nov., 1980	$1276.39	638.19	466.02	172.17
Dec., 1980	$1276.39	638.19	466.01	172.18
Jan., 1981	$1276.39	638.20	466.01	172.18
Feb., 1981	$1276.39	638.20	638.20	- 0 -
Mar., 1981	$1332.54	666.27	666.27	- 0 -

Total Deficiency October 8, 1980, to April 25, 1981: $688.70

*NOTE: Payment of April 27, 1981, of $443.22 was made but was directed to be applied to the December, 1979 payment. See Paragraph G.1. above.

It should be noted that only the ap-

plication of the Court's findings in its Order of Contempt on January 22, 1981, has caused LLOYD J. BADGETT, Defendant, to fully pay the res of the litigation monthly to the Clerk as previously ordered, and that for only two months.

WHEREFORE, MARY FRANCES ERSPAN, Plaintiff, prays that upon final hearing the Court assess the fine decreed against LLOYD J. BADGETT, Defendant, in the Order of Contempt of January 11, 1981 and further that the Court order LLOYD J. BADGETT, Defendant, to appear and show cause, if any he may have why he should not be adjudged in contempt of court for having violated the Order on Stay Pending Appeal between October 8, 1980 and April 25, 1981, and to order that he purge himself of contempt by the payment of one-half of all sums recived from the United States Army by him from December 6, 1979 to date of hearing hereof, and to order him to continue such payments into the Registry of the Clerk of this Court, pending appeal herein, together with all costs of this proceeding, including reasonable attorney's fees to MARY FRANCES ERSPAN'S attorney.

GUEVARA, REBE & BAUMANN

BY: Colbert N. Coldwell /s/
COLBERT N. COLDWELL

Attorney for MARY FRANCES
ERSPAN
Box 2009
El Paso, Texas 79950

IN THE UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF ARKANSAS

WESTERN DIVISION

RE: LLOYD J. BADGETT	§	AP# 81-226
	§	LR 81-226
	§	Chapter 7
DEBTOR	§	
	§	
	§	
MARY FRANCES ERSPAN	§	
	§	
PLAINTIFF	§	
	§	
VS.	§	
	§	
LLOYD J. BADGETT	§	
	§	
DEFENDANT	§	

ORDER

Upon application of Debtor and with the consent of Trustee, all wages earned by Debtor subsequent to the date of the Order of Relief herein, February 27, 1981, are abandoned.

IT IS SO ORDERED.

/s/
BANKRUPTCY JUDGE

DATE

Approved by:

/s/_____
William L. Owen
Attorney for Debtor

/s/_____
Basil V. Hicks, Jr.
Trustee

IN THE UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF ARKANSAS

WESTERN DIVISION

RE: LLOYD J. BADGETT	§	AP# 81-226
	§	LR 81-226
	§	Chapter 7
DEBTOR	§	
	§	
	§	
MARY FRANCES ERSPAN	§	
	§	
PLAINTIFF	§	
	§	
VS.	§	
	§	
LLOYD J. BADGETT	§	
	§	
DEFENDANT	§	

ORDER

Now before the Court is Complaint to determine dischargeability of debt owed to plaintiff and the Court finds that same should be, and hereby is, continued until conclusion of the case pending in the United States District Court, Western District of Texas, El Paso Division, styled Mary Frances Erspan v. Lloyd J. Badgett,

#EP-77-CA-18, now on appeal to the United States Circuit Court of Appeals for the Fifth Circuit.

FILED at Little Rock, this 29th day of April, 1981.

/s/
ARNOLD M. ADAMS
UNITED STATES
BANKRUPTCY JUDGE

cc: William L. Owen, Esq.
Malcolm R. Smith, Esq.
Colbert N. Coldwell, Esq.
United States District Clerk
Western District of Texas
El Paso Division - #EP-77-CA-18

APPENDIX K

IN THE DISTRICT COURT OF

EL PASO COUNTY, TEXAS

SIXTY-FIFTH JUDICIAL DISTRICT

MARY FRANCES BADGETT	§	
Plaintiff	§	
	§	
-vs-	§	No. 102449
	§	
LLOYD J. BADGETT	§	
Defendant	§	

J U D G M E N T

BE IT REMEMBERED that on this the 21st day of February, A. D., 1962, came on to be heard the above entitled and numbered cause, whereinMARY FRANCES BADGETT is Plaintiff, and LLOYD J. BADGETT, is Defendant, and Plaintiff appeared in person and through her attorney and Defendant appeared in person and announced ready for trial; whereupon a jury being waived, and the Court having examined the Plaintiff's petition for divorce and having determined that the same is in due form and contains all of the allegations and information required by law, and having heard the pleadings and the evidence, and being of the opinion that the material allegations of such petition are supported by the evidence and

are true and that all prerequisites of the law have been complied with and that Plaintiff is entitled to the following judgment:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the bonds of matrimony heretofore existing between the Plaintiff, MARY FRANCES BADGETT, and the Defendant LLOYD J. BADGETT, are hereby dissolved and the Plaintiff is granted a divorce from the Defendant.

THE COURT FURTHER FINDS that there is one child of this marriage under the age of eighteen, to wit: JILL, 14 years of age, and that the Plaintiff is the fit and proper person to have the full custody and control and the Plaintiff is hereby granted the full care, custody and control of said child.

THE COURT FURTHER FINDS that there are circumstances in this cause of such a nature as to warrant and require that the right of visitation of the Defendant to the minor child of this marriage, to wit: JILL, be and the same are hereby terminated and the Defendant is permanently enjoined from visiting or in any way contacting the minor child of this marriage.

THE COURT FURTHER FINDS that the Defendant is well and able to support said child and he is ordered to pay into the Registry of the Court the sum of $77.10 per month for the support and maintenance of said child as long as the Defendant re-

mains in the service of the United States Army.

IT IS FURTHER THE FINDING of this court that the parties acquired community property and that an agreement has been reached as to the division of same and that agreement is hereby adopted by this Court.

IT IS THE FURTHER JUDGMENT AND ORDER of this Court that the accumulated rights to a pension from the United States Army after retirement, commonly known as Retirement Benefits
hereby are declared and are community property and are hereby declared the joint property of the Plaintiff and the Defendant in equal parts and the Defendant is FURTHER ORDERED to execute all documents required by any agency to accomplish the payment directly to the Plaintiff of her one-half share of each payment made after retirement of the Defendant and the Defendant is hereby made personally responsible to the Plaintiff for such payment in case it cannot be made directly to her by virtue of some rule or regulation of the agency paying same; then and in that event, only, the Defendant is ordered to send to Plaintiff from such check as received by him one-half of such sum.

IT IS THE ORDER AND JUDGMENT of the Court that household goods companies, to wit: SHUTES EL PASO PIANO, IMPERIAL FURNITURE COMPANY, STATE NATIONAL BANK,

SEARS-ROEBUCK & COMPANY, and MONTGOMERY WARD be paid from the proceeds of the sale of the house. If there are no proceeds from the sale of the house, then and in that event only, it is hereby ordered that the parties return the goods to the creditors and any remaining debt shall be divided in a fifty-fifty obligation basis, with the obligation belonging 50% of the account to the Plaintiff and 50% to the Defendant.

IT IS THE FURTHER ORDER AND JUDGMENT of the Court that the following debts shall be the sole obligation of the Defendant: S. I. C. ALDENS, SPIEGEL, FED MART, B. F. GOODRICH, RAYBURNS, LERNER'S and WHYBURN INSURANCE COMPANY.

IT IS THE FURTHER JUDGMENT OF THE COURT, that all personal accounts of the Plaintiff, such as WHITE HOUSE, GILBERT'S, GIVEN'S, and GUARANTEE, shall be the sole obligation of the Plaintiff.

IT IS THE FURTHER ORDER OF THE COURT that the reasonable sum of $500.00, attorney's fees due Plaintiff's attorney, ALBERT ARMENDARIZ be assessed as court costs, 50% or $250.00 against each of the parties hereto and for which let execution issue, and Defendant shall pay costs, for which let execution issue.

MADE AND ENTERED THIS 21st day of February, A. D., 1963.

/s/_____
JUDGE, 65th Judicial
District

APPROVED: As-to-Form

/s/_____
Albert Armendariz, Attorney
for Plaintiff

/s/_____
Lloyd J. Badgett, Defendant

APPENDIX L

Dale E. Koon, Appellant,

v.

Anna Mae Koon, Appellee.

No. 5618.

Court of Civil Appeals of Texas, Eastland.

August 28, 1981

Rehearing Denied August 28, 1981.

This is a post-divorce proceeding in which the ex-wife seeks a portion of ex-husband's military retirement benefits which were not divided in divorce decree. After a nonjury trial, judgment was rendered that the ex-wife, Anna Mae Koon, recover from the ex-husband, Dale E. Koon the sum of $10,287.75 as her share of the military retirement benefits which he received from December 15, 1972, through March 12, 1980. The judgment also awarded Anna Mae Koon a 26.875% interest in Dale E. Koon's military retirement benefits "if, as, and when such benefits are received." Dale E. Koon appeals. We reverse and render.

(1) While the judgment does not specifically dispose of the ex-husband's counterclaim, it is an appealable final

Best Copy Available

judgment under the rule stated in North East Independent School District v. Aldridge, 400 S.W.2d 893, at 897 (Tex.1966).

The ex-husband's first point of error, that the trial court erred in awarding the ex-wife an interest in his military retirement benefits, controls the disposition of this case. On June 4, 1981, this court overruled the controlling point of error and affirmed the judgment of the trial court. That opinion was not published, for it followed the controlling case of Cearley v. Cearley, 544 S.W.2d 661 (Tex.1976) and distinguished Hisquierdo v. Hisquierdo, 439 U.S. 572, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979). While this case was pending in our court on motion for rehearing, the United States Supreme Court announced its decision in McCarty v. McCarty, 102 U.S. ___, 101 S.Ct. 2728, 69 L.Ed. 589 (1981).

(2) Whether we agree with the majority opinion's reasoning or the scholarly dissent, we are bound to follow the Supreme Court's holding in McCarty that "federal law precludes a State court from dividing military nondisability retired pay pursuant to state community property laws."

Our opinion of June 4, 1981, is withdrawn. Point of Error number one is sustained, and the judgment of the trial court is reversed. We render judgment

that Anna Mae Koon take nothing on her claim to a portion of the military retirement benefits of Dale Koon.

Court of Appeal, Fourth Appellate District

Division One

State of California

In re the Marriage of	§	
Carol and John Jacanin	§	
	§	
John Jacanin,	§	
Appellant,	§	
	§	4 Civ. No. 22826
v.	§	(Super. Ct.
Carol Jacanin,	§	No. D 125 970)
Respondent	§	

APPEAL from a judgment of the Superior Court of San Diego County, Gary Eugene Pike, Judge Pro Tempore. Reversed.

John C. Van Benthem for Appellant.

Carol Jacanin, in pro. per., for Respondent.

On April 6, 1978, after a twelve year marriage, respondent and former wife of appellant petitioned the superior court for the County of San Diego for a judgment of dissolution of marriage. On July 13, 1979, the matter was heard on the "short cause" calendar before a judge pro tempore, and the interlocutory judgment was entered on April 22, 1980.

In the judgment, custody of the parties' three minor children was awarded to the father, Mr. Jacanin, subject to

reasonable visitation rights reserved to the mother, Mrs. Jacanin. Mrs. Jacanin was awarded spousal support for the period of five years on a stepped down basis, in the sum of $500.00 per month from July 13, 1979, to January 12, 1980, and in the sum of $200.00 per month from June 13, 1980 to July 12, 1984, at which time spousal support terminates. The spousal support order is subject to reduction by one-half of Mrs. Jacanin's gross monthly income in excess of $200 for the first six months and by one-half of her gross monthly income in excess of $600 thereafter.

The community property of the parties, except for Mr. Jacanin's military retirement benefits, was valued at $23,500 and was initially divided unequally by the trial court which division was equalized by a monetary adjustment.

Paragraph 11 of the interlocutory judgment, which is the basis for the main issue on appeal, provides as follows:

> "Petitioner shall further be awarded an interest in respondent's U.S. Navy retirement equal to one-half of a fraction of the monthly payment to respondent as the retirement or retainer pay. The numerator of said fraction shall be 191, and the denominator of said fraction shall be the total number of months of respondent's actual military service. Said amount shall be paid to pe-

titioner by U.S. Navy allotment and this court shall retain jurisdiction to insure that the terms of this order concerning division of the community interest in respondent's retirement is carried out."

The statement of issue on appeal relating to paragraph 11 of the interlocutory judgment is simply, Does the system of military retirement benefits established by the Congress preempt the State of California from treating military retired pay as community property divisible upon dissolution of marriage?

It is with a great deal of reluctance this court considers it is compelled to answer this question in the affirmative.

As recently as July 1, 1980, the Supreme Court of California in a well-reasoned analysis of Hisquierdo v. Hisquierdo (1979) 439 U.S. 572 (99 S.Ct. 802) in In re Marriage of Milhan (1980) 27 Cal.3d 765, held Congress has not precluded the application of California community property law to military retirement pay, military insurance policies, or disability pay to the extent received in lieu of retirement. (Id., at p. 780.) The court recognized the United States Supreme Court has itself long recognized the "'"whole subject of the domestic relations of husband and wife . . . belongs to the laws of the States and not to the

laws of the United States"'" (Id., at p. 772.) Moreover, upon analyzing the contentions of Mr. Milhan as to the inferred applicablility of Hisquierdo and the Retired Serviceman's Family Protection Plan (10 U.S.C. § 1431 et seq.) and the Survivor Benefit Plan (10 U.S.C. § 1447 et seq.), the California Supreme Court stated "there is no basis for inferring a congressional intent to cut off the California community property rights of military spouses." (In re Marriage of Milhan, supra, 27 Cal.3d at p. 775.)

In ruling as it did in In re Marriage of Milhan, supra, the court recognized the well established adherence by the courts in this state and of the United States Supreme Court to the community property laws of the State of California.

On June 26, 1981, the Supreme Court of the United States, speaking through a majority opinion of six justices, ruled federal law does preclude a state court from dividing military retired pay pursuant to state community property laws. In its decision in McCarty v. McCarty (1981) 453 U.S. ---(101 S.Ct. 2728), the United States Supreme Court first held state family and family property law must do "major damage" to "clear and substantial" federal interests before the supremacy clause will demand that state law be overriden and then stated it is manifest that the application of community property

principles to military retired pay threatens grave harm to clear and substantial federal interests. The reasons which the majority of six justices provide for this surprising postulation are the community property division of retired pay has "the potential" to frustrate the objectives of providing for the retired service member and to meet the personnel management needs of the active military forces; community property division "may disrupt" the carefully balanced scheme Congress has devised to encourage a service member to set aside a portion of retired pay as an annuity for a surviving spouse; and, the "potential" for disruption of military personnel management is clear.

We do not agree these "potentialities" are actualities nor that they do major damage to clear and substantial federal interests in the absence of positive Congressional enactment.

Justice Rehnquist with whom Justice Brennan and Justice Stewart joined in a dissent stated the conclusion is inescapable the court has no solid support for the conclusion it reaches in McCarty saying there certainly exists no support of the sort required by Hisquierdo which held:

> "On the rare occasion where state family law has come into conflict with a federal statute,

> this Court has limited review under the Supremacy Clause to a determination whether congress has 'positively required by direct enactment' that state law be preempted." (Hisquierdo v. Hisquierdo, supra, 439 U.S. at p. 581.)

We are in complete agreement with the dissent but are barred from following it here. We observe the United States Supreme Court on July 2, 1981, granted the petition for writ of certiorari in Milhan v. Milhan No. 80-578 (In re Marriage of Milhan, supra, 27 Cal.,3d 765), vacated the judgment and remanded the case to the Supreme Court of California for further consideration in light of McCarty v. McCarty, supra.

The portion of the judgment which awarded Mrs. Jacanin a community property interest in Mr. Jacanin's retirement pay is reversed. Since the record is silent as to the basis for the trial court's spousal support order and since the division of respondent's retirement benefits between the parties according to the well accepted formula approach may have influenced the award, this matter is remanded to the trial court for further proceedings not inconsistent with this judgment.

In view of our action herein, there is no need to address ourselves to the remaining issues on appeal.

/s/
MALKUS, J.

WE CONCUR:

/s/
COLOGNE, Acting P.J.

/s/
STANFORTH, J.

Opposition

Office - Supreme Court, U.S.
FILED
DEC 28 1981
ALEXANDER L. STEVAS
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981
NO. 81-1155

LLOYD J. BADGETT,

Petitioner,

v.

MARY FRANCES ERSPAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CIVIL APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM A. ELIAS
Attorney at Law
1100 Montana
Suite 102
El Paso, Texas 79902

COLBERT N. COLDWELL
Guevara, Rebe & Baumann
P.O. Box 2009
El Paso, Texas 79950
Counsel for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81-1155

LLOYD J. BADGETT,

Petitioner,

v.

MARY FRANCES ERSPAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CIVIL APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, MARY FRANCES ERSPAN, of El Paso, Texas respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Fifth Circuit's opinion in this case is reported at 647 F.2d 550 and that court's opinion on suggestion for rehearing en banc is reported at 659 F.2d 26.

QUESTIONS PRESENTED (RESTATED)

1. Whether Petitioner is barred by res

judicata from collateral attack on a 1963 final judgment of divorce in Texas which, inter alia, had partitioned military retirement benefits, in a later suit seeking enforcement thereof because of the Supremacy Clause and the intervening opinion of this Court in McCarty v. McCarty (1981) 453 U.S. _____, 101 S.Ct. 2728, 69 L.Ed.2d 589?

2. Whether, assuming the validity of the 1963 Texas divorce decree, it is now to be considered void and unenforceable by virtue of this Court's opinion in the McCarty case when no court has the power to reform the divorce decree to make an equitable division of the community property of the parties in light of the McCarty holding?

3. Whether Petitioner is discriminated against by the application of the doctrine of res judicata when he is held to all defenses to the entry of a partition of community property in a 1963 divorce decree, not only that he actually asserted but that he could have asserted?

4. Whether the order of the Trial Court in this case, enforcing a final partition decree of a Texas divorce court, is it nullity and void because of a lack of jurisdiction to enter the order?

5. Whether the order of the Trial Court based upon 37 U.S.C., Section 701(d), should now be reversed because of this Court's ruling in the

McCarty case?

STATEMENT OF THE CASE

Respondent would add the following facts as pertinent to this Petition:

The Trial Court rendered judgment against Petitioner:

(1) for $34,691.90 for one-half of his military benefits accrued between June 10, 1971 and date of judgment;

(2) ordered him to execute and keep in full force an allotment to Respondent for one-half of his benefits in futero with the United States Army;

(3) Denied his Rule 12 Motion to Dismiss; and

(4) Permanently enjoined him from seeking to punish Respondent in Bankruptcy Court for alleged violation of his Discharge in Bankruptcy.

Petitioner appealed only provisions (2) and (4) and therefore provisions (1) and (3) of said judgment are final. See Appendix A and B.

The Fifth Circuit found that the partition in the Divorce Decree was not discharged in bankruptcy and that such exemption from discharge was not sexually discriminatory against former husbands.

Upon Application for Rehearing En Banc, the Fifth Circuit considered the question of whether the intervening opinion in McCarty would require

the holding of the partition of the retirement benefits void, requiring a "reversal" of the divorce decree and found that it would not.

ARGUMENT

1. Petitioner's first reason stated to grant the writ is that a state court lacks jurisdiction to partition military retirement benefits, and he claims that he raised this matter in a Rule 12(b)(6) motion. If the issue was so raised, it was abandoned on appeal for his failure to appeal his Rule 12 Motion under the 3rd paragraph of the Trial Court's judgment. His abandonment of the matter of appeal of paragraph (3) of the judgment of the Trial Court presents a further bar of res judicata in addition to the bar of res judicata arising from his failure to appeal the 1963 divorce decree.

2. Petitioner cites Koon v. Koon, 621 SW2d 834 (Tex.Civ.App.-Eastland, 1981) and Jacanin v. Jacanin (Cal.Ct.App.-unpublished) 81 Daily J.D.A.R. 2917 (1981) to support his position. These cases are to be distinguished by the fact that both were a direct appeal of a court order partitioning military retirement benefits. The res judicata effect of a final partition judgment of military retirement benefits was not considered in either case.

3. The Fifth Circuit considered the res judicata question in the case below and concluded:

a. Unlike McCarty and Hisquierdo (and indeed unlike Koon and Jacanin) there is no direct appeal in the case at bar from a state court divorce decree, and the Court of Appeals has no jurisdiction in this case to "reverse" the divorce decree.

b. Res judicata effect should be given to the divorce decree on all issues actually litigated and those that could have been litigated, even though the legal principles upon which the judgment rested may have been wrong or subsequently overruled, citing Federated Department Stores v. Moitie (1981) 453 U.S. _____, 101 S.Ct. 2424, 69 L.Ed.2d 103.

c. The issue of exemption of military retirement benefits from partition was not properly before the Fifth Circuit and the Trial Court's order requiring an allotment order of Petitioner was authorized by 37 U.S.C. Section 701(d) and by regulation of the Department of Defense.

Petitioner should not be able to knock out selectively a part of his divorce decree which partitions the one very substantial property right owned by the parties some eighteen (18) years after the decree became final. There is no

procedure whereby the divorce court can reconsider the circumstances of the parties and make equitable partition in light of the McCarty case. The 1963 divorce decree is final as against Petitioner and Respondent. If the partition of military retirement benefits would now be invalidated as to the 1963 decree, notwithstanding the principal of res judicata, then there is no avenue of remedy to Respondent to obtain other property or compensation from Petitioner in light of this Court's enunciation of the law in McCarty. What that means is that the divorce decree is res judicata as to divorced wives, but if Petitioner's position were adopted, such final decrees would not be res judicata on divorced military personnel, whether active or retired.

Albeit McCarty is the law, it should not be given retroactive effect to destroy rights long established by concluded litigation.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

William A. Elias

WILLIAM A. ELIAS
Attorney at Law
1100 Montana
Suite 102
El Paso, Texas 79902

COLBERT N. COLDWELL
GUEVARA, REBE & BAUMANN
P.O. Box 2009
El Paso, Texas 79950
Counsel for Respondent

CERTIFICATE OF SERVICE

A copy of the foregoing Petition for Cer-

tiorari has been mailed, postage prepaid to Stephen F. Hefner, 109 W. Houston, Sherman, Texas 75090 on this 5th day of ~~December~~ JANUARY, 1982.

William A. Elias

WILLIAM A. ELIAS

COLBERT N. COLDWELL

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

MARY FRANCES ERSPAN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	NO. EP-77-CA-18
	)	
LLOYD J. BADGETT and	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendants.	)	

ORDER ON STAY
PENDING APPEAL

BE IT REMEMBERED that on the 3rd day of December, 1979, the Court considered the Motion for Stay of the Defendant, LLOYD J. BADGETT, heretofore filed herein, when came Plaintiff and Defendant, LLOYD J. BADGETT, by and through their respective attorneys of record and the Defendant, LLOYD J. BADGETT, having stated in open court that he has waived and abandoned his notice of appeal as to paragraphs (1) and (3) only, of the Judgment of the Court dated November 3, 1979, but desires to appeal the Judgment of the Court as to paragraphs (2) and (4) thereof, and that he will execute and keep in full force and effect with the United States Army an allotment order directing the United States Army to pay to the Clerk of this Court one-half of all future retire-

ment benefits payable by it to Defendant, LLOYD J. BADGETT, pending appeal herein;

And it further appearing to the Court that a cost bond should be set by the Court and it appearing that $250.00 is a reasonable amount for such cost bond;

It is therefore ORDERED, ADJUDGED and DECREED that the amount of Defendant's appeal bond is set at $250.00.

It is further ORDERED, ADJUDGED and DECREED that Defendant, LLOYD J. BADGETT, shall execute and keep in full force and effect with the United States Army an allotment order directing the United States Army to pay to the Clerk of this Court one-half of all future retirement benefits payable to Defendant, LLOYD J. BADGETT, pending appeal herein and further, that inasmuch as an allotment order will obviate any requirement for supercedeas bond, no such bond is required for appeal at the present time.

It is further ORDERED, ADJUDGED and DECREED that the Clerk of the Court shall deposit all funds received for Defendant's United States Army retirement benefits in a daily interest bearing account with the First Savings & Loan Association of El Paso, such account to be held pending final appeal herein.

Except as hereinabove provided, Defendant's Motion for Stay is in all other respects, denied.

SIGNED this 6th day of December, 1979 at 8:35 a.m.

/s/
WILLIAM SESSIONS
United States District Judge

APPROVED:

/s/
RONALD CALHOUN
Attorney for Defendant

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

MARY FRANCES ERSPAN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	NO. EP-77-CA-18
	)	
LLOYD J. BADGETT and	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendants.	)	

JUDGMENT

In accordance with the Findings of Fact and Conclusions of Law rendered in the above-styled and numbered cause on this date,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

(1) Defendant, LLOYD J. BADGETT, shall pay to Plaintiff, MARY FRANCES ERSPAN, one-half of all of his military retirement benefits accrued between June 10, 1971 and the present, in the amount of $34,641.90, plus nine percent (9%) per annum from the date of this judgment.

(2) Defendant, LLOYD J. BADGETT, shall execute and keep in full force and effect with the United States Army an allotment order directing the United States Army to pay to Plaintiff, MARY FRANCES ERSPAN, one-half of all future

retirement benefits payable to Defendant, LLOYD J. BADGETT, to Plaintiff directly:

(3) Defendant's renewed Motion to Dismiss is hereby DENIED; and

(4) Plaintiff's Motion for Permanent Injunction against the Defendant to prevent Defendant from proceeding with his contempt action in Cause No. S-72-B-81, in the United States District Court for the Eastern District of Missouri, Southeastern Division, is hereby GRANTED.

November 3, 1979

/s/
WILLIAM S. SESSIONS
United States District Judge